Statement

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MISLEADING ADVERTISING AND THE *COMPETITION ACT*: COMPLIANCE AND ENFORCEMENT IN THE NINETIES

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by

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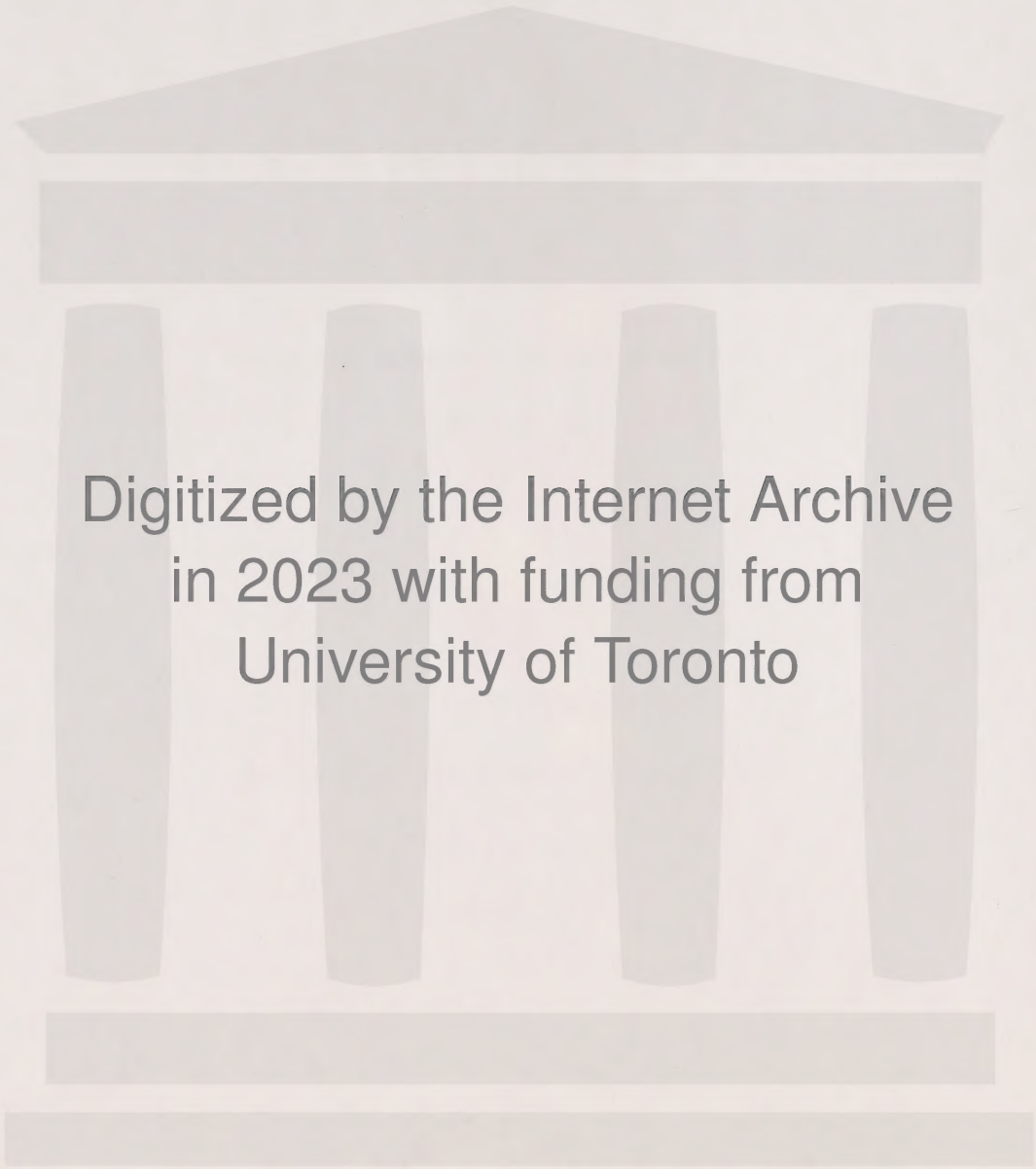

INTRODUCTION

Good afternoon. First, I would like to thank Mr. McDougall and this morning's speakers for their valuable presentations. This was indeed quite a learning experience for me.

I am pleased to have this opportunity to talk to you today about some major developments in the area of misleading advertising and deceptive marketing practices. I shall tell about the policies and priorities adopted by the Marketing Practices Branch as well as certain features of its operations relating to the enforcement of sections 52 to 60 of the *Competition Act*.

I shall begin by outlining the usual process, from the time we receive a complaint until we send a Summary of Evidence to the Attorney General of Canada. You will hear an overview of the factors assessed by the Branch before the Director initiates a formal inquiry and a description of the Alternative Case Resolution or the "ACR".

I shall also tell you about our focus on cases of national impact as outlined in our 1993 business plan.

I shall then look at the question of obtaining more effective deterrent penalties for violations of the Act, with respect to the liability of individuals and increases in the level of fines.

I shall point out the promotional practices that we are treating as priorities in the current fiscal year. I shall conclude on an international note, with a few words about the activities of the International Marketing Supervision Network.

OPERATIONS AND ACTIVITIES

The area of enforcement of the *Competition Act* goes beyond misleading advertising. It covers other deceptive marketing practices, such as multi-level marketing and pyramid selling plans, bait-and-switch selling and promotional contests.

Our primary objective is to promote healthy competition in the Canadian marketplace by helping to improve information about goods and services that is offered to consumers and businesses. The two complementary approaches of compliance and enforcement help us to attain this objective.

Most cases handled by the Branch arise from complaints made by consumers. Though less numerous, complaints from competitors are not, by that token, less important. Our Hull headquarters and our network of regional offices throughout Canada received some 10,000 complaints last year. Examinations are also initiated by our staff.

When we receive a complaint, an assessment officer determines whether it raises a question under the Act. We have three options at this point: first, we close the file if no question is raised or if the issue does not fall within Marketing Practices Branch priorities; second, we make an information contact, in person, by telephone or in writing. Hopefully, our informational action will stop the practice and prevent its recurrence; or third, we examine the case in greater depth if the first two options are not appropriate.

Let me explain our third option, which does not mean that a formal inquiry will begin at once. As you can foresee, our conveying of a complaint to a company gives it an opportunity to provide an explanation that will enable the case officer to determine whether sufficient reason exists to continue with the matter.

We enable the party under examination to state its position *voluntarily*. Most companies respond by providing details in support of their advertisement or practice.

This climate of co-operation is important in that we decide more quickly what action to take in a case, without the parties having to incur the costs and delays involved when the court-authorized formal powers are called upon to obtain information. More often than not, we close our file after having received a satisfactory explanation.

However, where an offence seems to have been committed, the matter is reviewed in light of assessment factors that help us decide whether to close the case, to ask the Director to initiate a formal inquiry, or to undertake an information contact.

If the Director has reason to believe that an offence has been committed, he may authorize an inquiry under section 10. You will be interested to know that section 9 allows six Canadian residents to apply for the commencement of an inquiry.

Parties under inquiry may write to me, as I am Deputy Director of Marketing Practices, or to a Branch regional manager, if they believe the case is suitable for a resolution as an "alternative case resolution" or ACR. When this occurs, the eligibility

of a matter for such resolution will most often be determined on the basis of specific criteria that I shall go into.

We sometimes find it necessary to seek formal powers for obtaining evidence. This could be an order requiring that parties provide oral or written returns of information and/or provide relevant documents (section 11) or it could be a search warrant (section 15). When necessary, the Director will prepare and forward to the Attorney General a Summary of Evidence, with a recommendation that charges be laid or a prohibition order be considered.

The Branch also promotes compliance through the Director's Program of Advisory Opinions, the publication of the *Misleading Advertising Bulletin*, *AdVice* and the Misleading Advertising *Guidelines*. And, as you can see, we give speeches to the public and media contacts. The recently published pamphlet on sections 52 to 60, explaining how business can avoid engaging in misleading advertising, along with a new ten-minute video, will be used in our presentations to small and medium-sized businesses. We also plan to use videos to warn potential targets of deceptive mail and telemarketing solicitations.

ASSESSING THE IMPACT OF CASES

Recent resource constraints have led to the Branch's compliance approach and the prosecution of those cases causing the most harm in the marketplace, and most likely to have the greatest deterrent effect.

To maintain a uniform approach within a decentralized structure, we use a set of factors to evaluate a file prior to considering an inquiry. We assess the adverse economic impact of the harm caused and we consider the potential jurisprudential and deterrent value of the case.

The economic factors are:

- the cost of production, the frequency of the ad and the number of people reached;
- the degree to which the misrepresentation appears to affect purchase decisions;
- the likelihood that the target audience would detect the deception, thus mitigating the damage to consumers because they would alter their subsequent purchasing behaviour or inform others about their experience; and
- the extent to which the misrepresentation contributes to the perpetrators' ability to act independently of the market, which will depend on the level of concentration in the market.

The enforcement policy factors are:

- Whether the case involves national or interprovincial practices with higher economic impact;
- Whether the issue relates to one of the Branch's annual workplan priorities; and

- Whether the matter arose from a complaint from a competitor or an association, or if the matter has a high public profile or if it attracts media attention.

Competitor complaints are often given more weight than those coming from individual consumers because competitors generally provide more detailed information. Moreover, failure of the Branch to take action on a competitor complaint could lead to a rapid spread of a questionable practice to an entire industry.

Another enforcement-related factor that we look at is whether there is evidence that the deceptive practice was deliberate.

The advertiser may have received a negative advisory opinion on the practice or may have been the subject of an explicit information contact that covered the practice. The questioned conduct may also be in breach of an undertaking or an order against the advertiser, or be similar to practices that resulted in a conviction obtained against the advertiser. In such circumstances, it would be assumed that the practice results from deliberate or reckless behaviour.

The enforcement may also depend on:

- Whether the case will bring about the courts' interpretation of advertising terminology or of a previously untested offence provision; and
- Whether it has potential to serve as a general deterrent based on the size of the perpetrator or on whether the practice is widespread.

OTHER INSTRUMENTS FOR RESOLVING CASES

Our goal to correct or offset misinformation given to the public led us to explore avenues other than the traditional criminal prosecution under sections 52 to 60 of the Act.

Some five years ago, we responded to this situation with the Program of Alternative Case Resolution or ACR. An ACR can take shape as an undertaking by the party under inquiry or as a 'consent prohibition order'.

An undertaking is a document in which the party under inquiry agrees to stop the impugned practice, to take specific action to ensure that the situation will not recur and to correct the misimpressions left in the marketplace. This is usually done through the publication of corrective notices in newspapers.

In some rare cases, one of the ACR terms has required restitution to victims. Undertakings rather than prohibition orders under section 34(2) are probably the most appropriate form of ACR when there is a pressing need to correct a situation.

Consent prohibition orders have also been used to stop parties from making misleading representations. The decision to proceed under section 34(2) rather than by way of an undertaking is generally made when the circumstances of the case require that the resolution be enforceable.

Such orders are often accompanied by a written commitment by the party under inquiry to correct the situation caused by the practice in question.

The Marketing Practices Branch informs parties of the existence of the ACR process by sending them an information letter. It is important to note that access to the ACR process is predicated on our receipt of a written request from the party under inquiry. In no case does the Director take the initiative and "offer" this alternative to a party under inquiry.

Let me emphasize that it can be premature to request an ACR before receiving the information letter. To request an ACR too early in the proceedings could very well prove pointless if an inquiry is not justified. Here's another point to bear in mind: a resolution by way of undertaking is no longer available once a Summary of Evidence has been referred to the Attorney General of Canada, as the matter is then subject to the discretion of the Attorney General and not the Director of Investigation and Research.

The Attorney General retains the discretion to propose that a case be resolved by way of a prohibition order, with or without consent, after referral by the Director.

The eligibility of a matter for ACR negotiations will always be assessed by a review committee in the Branch on the basis of factors designed to ensure fairness and uniformity. The suitability analysis prepared by the case officer includes the following criteria, not all of which have equal weight:

- The history of the requesting party in respect of anti-competitive activity;
- Whether the matter involves the contravention of a prohibition order or of an undertaking;

- The impact of the practice on marketplace participants, consumers and competitors alike;
- The corporate policy of the company involved and whether the conduct ceased as soon as senior officials became aware of it;
- Whether there was a previous advisory opinion or information contact given on the conduct;
- Whether the party attempted to remedy the adverse effects of the conduct;
- The effects of the conduct on other objectives of the Act; and
- The most appropriate instrument for case resolution to best restore competitive equilibrium to the market.

If the request for an ACR is accepted and an undertaking appears to be the appropriate tool, the party must, on its own initiative, submit a draft of its terms before we will begin detailed discussions.

When a consent prohibition order is chosen as the more appropriate instrument, there is no obligation for the party to submit a proposed draft, although it may.

Undertakings and consent prohibition orders under section 34(2), which do not presuppose an admission of guilt, become public, once finalized. A description of each ACR is published in the *Misleading Advertising Bulletin.*

A sixty-day period is generally imposed at the outset of the negotiations for a settlement to be reached, failing which the inquiry will continue and the case will be referred to the Attorney General for consideration of a prosecution if sufficient

evidence is obtained. Of course, negotiations could break down sooner but, so far, once a matter has been approved for negotiation, we have never failed to obtain an undertaking.

NEW APPROACH TO ENFORCEMENT

I will now talk about the change in the Branch's approach to enforcing the Act. Our approach is selective and includes inter-office coordination while providing consistency and deterrent impact.

Government funding constraints have forced us to direct the bulk of our resources to national and inter-provincial practices that have a greater economic impact.

Regarding our inter-regional coordination and consistency in enforcement, the Branch operates with 57 staff, distributed throughout headquarters and a network of 7 field offices. We are gradually moving away from the so-called "territorial" approach that, till now, had marked the enforcement of the Act.

Our decentralized structure means that all regions and headquarters can be involved in the prosecution of national cases. Increasingly, the various aspects of an investigation or even a number of similar investigations will be allocated to the regional offices. This will promote a more efficient intervention against practices taking place in several regions.

I don't want to give you the impression that we intend to ignore practices that are intra-provincial or local. On the contrary. We continue to move actively against such practices when they are blatant, when they have a widespread economic impact in a regional market, and when there is potential for setting a useful legal precedent.

Finally, our new approach intended to enhance deterrence also forms part of the policy adopted by the Bureau for the handling of criminal cases. We shall continue to assist the Attorney General in actively prosecuting cases so as to heighten the general and specific deterrent impact of cases.

It is also noteworthy that the Bureau is developing guidelines to ensure that our sentencing recommendations to the Attorney General in conspiracy and bid-rigging cases are fair and uniform. Similar guidelines may be developed for marketing practices offences.

INCREASING FINES

To increase its deterrent impact, the Branch will be even more diligent in pursuing higher fines whenever appropriate.

The average fine per case for misleading advertising and deceptive marketing practices has grown substantially during the past five years, from $12,406 in 1988-89 to $30,759 in 1991-92. The courts increasingly recognize the importance of the economic and social impact of this kind of offence.

The increase in fines may be attributable in part to the Branch's continuing reorientation towards high or national-impact advertising or marketing. Although average fines declined slightly in the past year, we expect a continuation of the general trend towards higher levels.

Our emphasis on higher impact cases and on corresponding penalties has resource implications. Investigations into practices of national scope are, I said, often lengthy and costly. The need to show that the nature and economic impact of a practice justifies stronger penalties also increases the pressure on resources. Ideally, such evidence would show the extent of the gain obtained through the practice and possible aggravating or mitigating factors.

LIABILITY OF OFFICERS AND DIRECTORS

One important avenue towards more effective deterrence is to increase the perceived risk for corporate officials responsible for the illegal practices. To this end, we continue to seek evidence supporting charges in appropriate circumstances against individuals responsible for deceptive marketing practices, and to recommend fines and, if necessary, jail terms commensurate with the offence and with our deterrence goals.

As you all probably know, the most important fine ever imposed on an individual under the *Competition Act* in relation to charges of misleading advertising is a half-million dollar fine against Donald Cormie. Charges were laid for deceptive practices

related to the collapse, in the mid-eighties, of the Principal Group of Companies in Alberta.

Donald Cormie ultimately pleaded guilty to a charge under section 52(1)(a) of having made misrepresentations in his "Message from the Chairman" in the annual review of the Principal Group. Cormie had been directly involved in the preparation and approval of the Chairman's message.

Charges against him and his guilty plea show that individuals may not mislead the public and seek shelter behind a corporate entity to avoid the penalties provided in the Act.

Despite the possibility that jail terms may be imposed for offences under the Act, this option has been used only rarely for misleading advertising. Some of you might be surprised to learn that the maximum term imposed has been one year. Recently the Bureau has recommended prison terms for individuals suspected of having committed offences under the Act.

We will continue to seek deterrent sanctions against those individuals considered persistent offenders. These sanctions could very well take the form of recommendations for jail terms in the worst cases. It should be noted that perpetrators of offences under sections 52, 53, 55, 55(1), 56 and 59 can be prosecuted by way of indictment.

As with fines, attempts to increase the deterrent value of penalties by targeting the responsible individuals may well mean that investigations will become more difficult

since investigators will be required to provide sufficient evidence to persuade the courts that the person in question directly approved of or participated in the deceptive practice.

Evidence that a corporate officer acted with intent or recklessness in the course of committing an offence would support an argument for a more deterrent sanction. In appropriate cases, the Branch intends to conduct its investigations in such a way as to obtain this evidence.

Another interesting development in bureau policy toward individuals charged under the Act concerns the question of extradition. Extradition can now be granted for any offence under the *Competition Act* that is punishable by a jail term exceeding one year as long as a similar offence is subject to such punishment in the country where extradition proceedings would also take place.

A few weeks ago, on the Branch's recommendation, the Attorney General filed an application for extradition with the American authorities in relation to a Canadian offence. Our Branch will continue to recommend that extradition proceedings be initiated when necessary.

PRIORITIES FOR ENFORCEMENT

I now come to the practices that continue to be our priorities in the current fiscal year: telemarketing and misleading mail solicitations.

We are pursuing a combined effort with police forces and other government agencies against misleading and fraudulent telemarketing as part of project "Phonebuster", which we undertook last year.

The project combines the financial and human resources of the OPP, the RCMP, the Marketing Practices Branch, and some of our provincial counterparts. Our goal is to develop cases leading to prosecution under the *Criminal Code of Canada* of key individuals involved, as well as to charge certain companies and individuals under section 52 of the *Competition Act*. So far, this operation has led to the arrest and the laying of fraud charges against four individuals last November.

We intend to continue to target practices relating to misleading and fraudulent representations made as part of mail solicitations. Charges were laid against two such companies last year and they should soon produce results.

We are also continuing the efforts we began several years ago to enforce section 52(1)(d) with respect to misrepresentations concerning ordinary or regular prices. Some half dozen cases involving major retailers are at very advanced stages. Again, we expect important developments in these cases in the next few months.

Although it has not been identified as a priority *per se*, I should point out that charges were laid under the new section 55 against a multi-level marketing company as well as several individuals. They were charged with making representations about the profits that could be made by participants in the scheme without disclosing the

earnings of typical participants in that scheme. This case is the first under the new section 55 since it came into force in January 1993.

INTERNATIONAL CO-OPERATION

Nowadays the word "globalization" is on everyone's lips. Accordingly, I would like to say a few words about the Branch's efforts to link with counterpart foreign law enforcement agencies.

In 1990, the Branch became a founding member and liaison for other Canadian agencies within the International Marketing Supervision Network. The Network now has more than twenty member-countries from Europe and the Americas, including the United States and Mexico. The primary object of the network, where members regularly exchange certain information, is to promote international co-operation in detecting and fighting unfair and deceptive marketing practices.

The Network's next annual conference will be held in Stockholm this September. Cross-border advertising, the sale of health products and international lotteries are some of the subjects on the agenda. There will also be a June working session to address the growing problems linked with some promotions of time-sharing real estate property.

We have increased our contacts with the Bureau of Consumer Protection in the Federal Trade Commission. As far as possible, we have co-operated in investigations and taken part in exchanges of information, primarily in the field of misleading

telemarketing targeting American consumers from Canada. Discussions are under way for increased co-operation in the fight against cross-border telemarketing.

All these efforts to bring together the various law-enforcement agencies dealing with problems caused by cross-border practices are significant in the context of globalized markets. However, the provisions regarding confidentiality of the information obtained in the enforcement of legislation governing trade often constitute limits to such efforts. This question will certainly make for a more lively debate in the years to come. We will undoubtedly have occasion to talk about this again.

CONCLUSION

I hope that this presentation has helped you understand the approach adopted by the Branch to fulfill its mission in the Canadian market in the coming years.

While continuing to opt for a compliance-oriented approach in appropriate cases, we shall seek to enforce the Act in cases that have a major economic impact on Canadian consumers and business. To meet this goal, we intend to maximize the use of the organization's structure and of the quality of its human resources and, in so doing, we intend to make full use of the powers and penalties provided in the statute to enhance deterrence.

Thank you for your attention.